No. 97-1802

In The

Supreme Court of the United States

October Term, 1998

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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ARGUMENT

I. PETITIONERS' SUMMARY OF THE EVIDENCE IS AN ACCURATE REFLECTION OF THE RECORD.

Respondent contends that petitioner's summary of the evidence does not contain facts. *See* Resp. Br. on merits at p. 5, n.6. Respondent also contends that petitioners' reference to their own mental states are not undisputed. *See* Resp. Br. at p. 5, n.6. Respondent's contentions about the accuracy of petitioners' summary of the evidence are wrong because petitioners' summary of the evidence is an accurate reflection of the record below.

Petitioners' evidentiary summary of their own mental states is based on undisputed facts that are supported by the record. (2 J.A. 236 and 241). For example, when Traci Baker returned to the grand jury after her first request to consult with respondent was granted, she asserted her Fifth Amendment rights without advising either David Conn nor Carol Najera that she had not consulted with respondent. Consequently, both Conn and Najera believed that Baker had conferred with respondent as she had requested. (2 J.A. 235-236 and 2 J.A. 240-241). Once Traci Baker returned to the grand jury after her second request to confer with respondent was granted, she once again asserted her Fifth Amendment rights without telling either Conn nor Najera that she did not speak with respondent. (2 J.A. 235-236 and 2 J.A. 240-241).

The petitioners were convinced that Traci Baker had conferred with respondent each time she requested to do so based upon the way she asserted her Fifth Amendment rights and her failure to tell anyone she had not consulted with respondent, which is reflected in the record, when Conn and Najera state as follows:

> "During Ms. Baker's grand jury testimony she requested on three (3) separate occasions to confer with her attorney. All three (3) of her requests to confer with her attorney were granted and *I believed* she conferred with her attorney on each occasion because on two (2) occasions she asserted her Fifth Amendment privilege on 'the advice of counsel', and

she never indicated or stated in any manner that she did not confer with her attorney when she was given permission to consult with him." (2 J.A. 236 and 241) (Emphasis added)

In contrast, respondent has not cited any part of the record which disputes the reasonable belief of Conn and Najera that Traci Baker had conferred with him when she was allowed to leave the grand jury hearing room. The absence of any evidence by respondent to controvert Conn and Najera's belief, renders undisputed the mental states of both Conn and Najera. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250, 106 S.Ct. 2505, 2511, (1986) (FRCP 56(c) provides that when a properly supported motion for summary judgment is made the adverse party must set forth specific facts showing that there is a genuine issue for trial); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, (1968) (In the face of defendants' properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get to a jury without any significant probative evidence tending to support the complaint). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324, 106 S.Ct. 2548, 2553, (1986).

When a court determines a motion for summary judgment, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc. id.*, 477 U.S. at 248, 106 S.Ct. at 2510. Thus, factual disputes that are irrelevant or unnecessary will not be counted. *See Anderson v. Liberty Lobby, Inc., id.*, 477 U.S. at 248, 106 S.Ct. at 2510. The facts that are material to this Court's determination of the two questions for which certiorari was granted, are as follows:[1]

[1] Respondent's statement of facts lists other facts that are either immaterial or irrelevant to the certiorari questions now before this Court. For example, it is immaterial that Detective Zoeller and Officer Miller, appeared unannounced at Baker's home although Zoeller knew she was represented by respondent who was not present. *See* Resp. Br. at p. 8. The questioning of Baker by Conn, Najera and Zoeller during the search of her home on March 18, 1994, is also immaterial. *See* Resp. Br. at p. 9. Furthermore, Baker's state of mind before her grand jury testimony and upon hearing about her possible arrest is immaterial and cited for the purpose of emotional impact. *See* Resp. Br. at p. 13. Moreover, Baker's distress, upset and agitation when respondent did not speak with her is immaterial. *See* Resp. Br. at p. 15.

1. Respondent knew that he could not accompany Traci Baker inside the grand jury hearing room. (2 J.A. 334)
2. Traci Baker knew that respondent was not allowed to be with her during her grand jury testimony. (2 J.A. 376-377)
3. Respondent was not actively engaged in giving legal advice or counsel to Traci Baker when he was served with the search warrant. (2 J.A. 434-435 and 3 J.A. 532-533).
4. When the search warrant was served on respondent, he did not ask that the search be delayed until after his client was through testifying. (3 J.A. 541).
5. Each of Traci Baker's requests to consult with respondent were granted without any restrictions or limitations placed upon her by petitioners. (2 J.A. 235-236; 2 J.A. 240-241; 2 J.A. 370-371, 375, 378-379, 461-463, 467 469-471 and 3 J.A. 610-614).
6. When respondent was told that his client wanted to speak with him about her grand jury testimony he refused to talk to her. (2 J.A. 437-438).
7. The search warrant was valid and lawful. (Pet. App. A, p. A-20).
8. After the two searches respondent represented Traci Baker at the contempt proceeding. (3 J.A. 621-622)

All of the above-mentioned material facts are undisputed because there were no facts offered by respondent to contradict them. Consequently, the facts contained in petitioners' Summary of the Evidence may properly be considered by this Court

as part of its certiorari review because said facts are uncontroverted.

II. RESPONDENT'S BRIEF ON THE MERITS CONTAINS FACTUAL INACCURACIES THAT ARE NOT SUPPORTED BY THE RECORD.

Respondent's brief contains factual inaccuracies that petitioners will identify for this Court, because the inaccuracies that are being relied upon by respondent are not supported by the record. Respondent alleges in his Statement of Facts that Conn had planned that the warrant for Gabbert would be executed as Baker was summoned into the grand jury room to commence her testimony. *See* Resp. Br. at p.10. Respondent cites 3 J.A. 492; plus 495-497, as the evidentiary support for this spurious assertion. A review of the record at 3 J.A. 492 and 495-497 reveals that there is no mention or suggestion made by Conn that he planned to have the warrant executed on respondent when Baker was called before the grand jury. Therefore, this Court should reject respondent's baseless assertion that Conn planned the search to occur at the time Baker was to testify before the grand jury. *See Russell v. Southard*, 12 How. 139, 158-159 (1851) (This court must affirm or reverse upon the case as it appears in the record); *Adickes v. Kress & Co.*, 398 U.S. 144, 157-158 n. 16, 90 S.Ct. 1598, 1608 n. 16, (1970) (The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record).

Respondent also makes the false contention that during oral argument before the Ninth Circuit, petitioners' counsel conceded that service of the warrant was timed to take advantage of the nervousness of Baker and the distraction it would cause the respondent.[2] Resp. Br. at p.36. A close review of the record shows that petitioner's counsel did not concede that Conn or Najera timed the service of the warrant to take

[2] Conn and Najera never stated or implied in their declarations (2 J.A. 233-242) nor in their deposition testimony (3 J.A. 483-547) that the service of the warrant on respondent was somehow timed to take advantage of Baker or respondent.

advantage of either respondent or Baker, because Mr. Renick responded as follows:

> "THE COURT: and why did they choose not to?
>
> MR. RENICK: Probably to take advantage and – I mean, without getting into whether or not that's – in fact, *let's assume* that they were doing that to take advantage." (*See* App. B of Resp. Br. on Merits at pp. 27-28) (Emphasis added)

Mr. Renick also made it clear to the Court of Appeal that Conn and Najera did not plan to prevent Baker from communicating with respondent[3], by stating:

> "THE COURT: But you just told us earlier that was part of their plan.
>
> MR. RENICK: I'm saying we can assume. Let us *assume* that.
>
> THE COURT: That's why they –
>
> MR. RENICK: No, not – not – I certainly . . . , if I did, I apologize. *I never said that their purpose presumptively was to prevent communication*. If anything, it would have been Ms. Baker's being questioned to reveal information that she's reluctant to reveal". (*See* App. B of Resp. Br. on merits, at pp. 32-33) (Emphasis added)

Respondent further asserts in his Statement of Facts that Conn and Najera were determined, "by whatever means available", to obtain the letter from Lyle Menendez to Traci Baker and to win the trial. *See* Resp. Br. at p. 7. In support of this allegation respondent relies on two newspaper articles from the *Los Angeles Times*. *See* Resp. Br. at p. 7. Since these articles

[3] There is no statement expressly or implicitly by Conn or Najera that they intended to prevent respondent from communicating with Ms. Baker. (2 J.A. 233-242).

are not part of the official record, there is no evidentiary basis for the factual assertions made by respondent. Hence, the allegation should be stricken and not considered by this Court.[4]

Respondent also makes the misleading contention that he was physically sequestered away from his client as a result of being served with the search warrant. *See* Resp. Br. at p.34. This assertion is disingenuous because when respondent was served with the warrant *he* requested a private room and his request was granted. (2 J.A. 435). In addition, both respondent and Baker knew they would be physically separated from each other when she testified before the grand jury regardless of whether a warrant was served. (2 J.A. 334, and 376-377).

III. PETITIONERS DID NOT CAUSE RESPONDENT'S FOURTEENTH AMENDMENT RIGHTS TO BE VIOLATED WHEN HE WAS SEARCHED WHILE HIS CLIENT WAS TESTIFYING BEFORE THE GRAND JURY.

The central issue before this Court is whether a prosecutor violates an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched at the time his client is *testifying* before a grand jury. (3 J.A. 696). However, instead of directly addressing this issue, respondent's brief discusses unrelated issues and never fully responds to the first certiorari question. For example, respondent argues that Baker had a right to expect that the government would not interfere with her legal representation. *See* Resp. Br. pp. 20-23. This argument does not address either of the certiorari questions, because an alleged violation of Baker's rights cannot be the basis for establishing a violation of respondent's rights. *See Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975)

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[4] Newspaper articles are generally inadmissible hearsay that are not considered by courts when ruling on a motion for summary judgment. *See, e.g. Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742-743 (7th Cir. 1997); *Bonilla v. City of San Diego*, 755 F.Supp. 293, 298 n.5 (S.D. Cal. 1991).

(Plaintiff cannot rest his claim for relief on the rights of third parties).

Respondent also contends that a lawyer's guidance to his client is critical at the grand jury stage because the client's liberty is at stake. *See* Resp. Br. pp. 23-26. Here again, respondent focuses on his client's rights as somehow providing the basis for a violation of his Fourteenth Amendment rights. Furthermore, this Court has twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if she is the subject of the investigation. *See United States v. Williams*, 504 U.S. 36, 49, 112 S.Ct. 1735, 1743 (1992). Since there is no Sixth Amendment right to counsel at a grand jury proceeding, a lawyer's guidance at the grand jury stage should not be deemed critical.

The reason respondent has failed to answer the first certiorari question is because a prosecutor does not violate an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched *at the time* his client is *testifying* before a grand jury. The right to hold specific private employment and to follow a chosen profession free from unreasonable government interference falls within the liberty concept of the Fourteenth Amendment. *See Greene v. McElroy* 360 U.S. 474, 492, 79 S.Ct. 1400, 1411 (1959). However, the Constitution only protects liberty interests from state actions that threaten to deprive persons of the right to pursue their chosen occupation. *See Piecknick v. Com. of Pennsylvania*, 36 F.3d 1250, 1259 (3rd Cir. 1994); *Bernard v. United Township High School Dist. No. 30*, 5 F.3d 1090, 1092 (7th Cir. 1993).

To establish a Fourteenth Amendment substantive due process claim predicated on the right to practice one's profession, an attorney must show that he was banned or excluded from his profession. *See e.g. Wedges/Ledges of California, Inc. v. City of Phoenix, Az.*, 24 F.3d 56, 65 (9th Cir. 1994); *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991). Here, the record shows that respondent was neither banned nor excluded from the practice of law due to two primary reasons. First and foremost, each time Traci Baker made a request to consult with respondent, her request was

granted without any restrictions. (3 J.A. 610-614; 2 J.A. 461-463, 467 and 469-471). Secondly, when respondent was advised that his client needed to talk with him, he refused to speak with her. (2 J.A. 437-438).

Since respondent was neither excluded nor banned from practicing law, his Fourteenth Amendment right to practice his profession was not violated by Conn or Najera. Furthermore, petitioners did not unreasonably interfere with respondent's right to practice his profession, because Baker was released to speak with respondent during the search, but it was respondent who made the decision not to consult with her. (2 J.A. 437-438). In addition, respondent's Fourteenth Amendment rights were not violated when the warrant was served on him because he was not engaged in giving legal advice to Baker when the warrant was served. (2 J.A. 434-435 and 3 J.A. 532-533). Moreover, since respondent had no right to be present with Baker when she was testifying before the grand jury, the service of the warrant on him while she was testifying did not deprive him of his right to practice his profession.

A. The Petitioners Did Not Prevent Respondent From Communicating With His Client.

Respondent contends that Conn and Najera prevented him from communicating with his client. *See* Resp. Br. at pp. 28-30. This contention is specious because Conn and Najera gave Traci Baker access to respondent without placing any limitations on either of them. For example, each of Baker's requests to consult with respondent were granted. (2 J.A. 235-236; 2 J.A. 240-241; and 3 J.A. 610-614). When Traci Baker was allowed to leave the grand jury to consult with respondent, pursuant to her first request, Patty Jo Fairbanks informed respondent that his client needed to speak with him. (2 J.A. 438). Instead of taking the opportunity to speak with Traci Baker, respondent refused to do so and bluntly responded: "That's tough. They created this situation. They can wait as long as it takes." (2 J.A. 438). If Conn and Najera were truly attempting to prevent respondent from speaking with Baker, they would have stopped her from leaving the grand

jury hearing room, or limited the length or content of her discussion with respondent. Obviously, none of these kinds of restrictions occurred here.

Instead of refusing to speak with his client, respondent could have simply asked the special master, Elliot Oppenheim, to stop the search and leave the room so that he could speak with his client in private. There was no state law nor District Attorney's Office policy or regulation that prevented the special master from stopping the search to allow respondent to consult with his client. Further, Conn and Najera did not tell the special master that the search could not be interrupted. In addition, Conn and Najera did not do anything to prevent respondent from simply asking the special master to interrupt the search so that he could confer with his client.

If respondent had asked the special master to stop the search so he could consult with his client there would have been no reason for the special master to deny his request. Therefore, if respondent had asked, the special master would have stopped the search and left the room so that respondent could advise Baker in private. Thus, just as respondent's request for a private room to conduct the search was granted (2 J.A. 435); if he had only bothered to ask, the search would have been temporarily stopped.

In light of respondent's own actions, his claim that Conn and Najera either prevented him or interfered with his ability to speak with his client should be rejected by this Court. Similarly, the Ninth Circuit also rejected respondent's claim that Conn and Najera prevented him from speaking with his client due to the following:

> THE COURT: How can he complain that his ability to communicate with his client, who needed his advice, was being impaired when he tells them, Look it. I don't want to talk with her?
>
> . . .
>
> If the real hub of the problem here was that the search warrant was executed at the very time the client needed advice from her lawyer, doesn't the

passage read to you from your client's own deposition suggested that he caused that conflict by his own actions.

THE COURT: Does the record show that he was – that if he had wanted to talk with her at that moment that he was physically restrained from doing so?

M. LIGHTFOOT: Well, I don't think the record speaks to that . . . " (*See* Resp. Br. on merits, App. B, at pp. B-5 thru B-6).

Since Conn and Najera did not prevent Traci Baker from having access to respondent, and because respondent chose not to speak with Baker, petitioners were not the cause of respondent's alleged failure to speak with his client.

B. Respondent Cannot Base His Fourteenth Amendment Claim Upon An Alleged Violation Of His First Amendment Rights Because He Failed To Raise A First Amendment Claim Below.

This Court granted certiorari on the question of whether respondent's Fourteenth Amendment rights were violated when he was being searched at the time his client was testifying before the grand jury. (3 J.A. 696). It is obvious from this Court's order that respondent's First Amendment rights are not properly before this Court. Nevertheless, respondent makes the claim that Conn and Najera violated his First Amendment rights. *See* Resp. Br. at pp. 33-35.

Respondent's attempt to somehow predicate his Fourteenth Amendment claim on an alleged violation of his First Amendment rights should not be considered by this Court, because a First Amendment claim is outside the bounds of the order of certiorari. *See Regents of the University of California v. Doe*, 519 U.S. 425, 117 S.Ct. 900, 905 (1997) (Court declined to address a question or argument that was not encompassed within the question certiorari was granted upon); *See also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, (1992). Furthermore, this Court should refuse to address respondent's newly raised First

Amendment argument because he failed to raise a First Amendment claim in either the district court or the Ninth Circuit.[5] *See DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189, 195, n. 2, 109 S.Ct. 998, 1003, n.2, (1989) (Argument made for first time in brief that was not pleaded in complaint; not argued to court of appeals; and not raised in petition for certiorari would not be considered); *Granfinanciers v. Nordberg*, 492 U.S. 33, 38, 109 S.Ct. 2782, 2788, (1989) (Court declined to address argument not raised below.); *Dothard v. Rawlinson*, 433 U.S. 321, 323, n.1 97 S.Ct. 2720, 2724, n.1 (1977) (Issue raised for first time in brief and not having been raised in District Court is not before Court); *See also, Youngberg v. Romeo*, 457 U.S. 307, 316, n. 19, 102 S.Ct. 2452, 2458, n. 19 (1982) and *Pennsylvania Dept. Of Corrections v. Yeskey*, ___ U.S. ___, 118 S.Ct. 1952, 1956 (1998).

Respondent concedes in his brief that his Fourteenth Amendment claim is based upon the substantive component of the due process clause. *See* Resp. Br. at pp. 27-28, n. 15. Since respondent is only making a substantive due process claim, he cannot look to the First Amendment as the basis for his relief. *See County of Sacramento v. Lewis*, 523 U.S. ___, 118 S.Ct. 1708, 1714-1715 (1998) (Substantive due process analysis inappropriate if respondent's claim is covered by the Fourth Amendment); *see also Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871 (1989).

Due to respondent's failure to raise a First Amendment issue in either the district court or the court of appeal, and because of the limited scope of this Court's order of certiorari, petitioners' respectfully request that this Court decline to consider any First Amendment issues.

C. Petitioners Did Not Engage In Conscience Shocking Or Deliberate Indifferent Conduct.

This Court's cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense. *See*

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[5] Respondent's Complaint fails to allege the First Amendment as the basis for his relief. (*See* 1 J.A. 24-28).

County of Sacramento v. Lewis, *id.*, 118 S.Ct. at 1716; *Collins v. Harker Heights, Texas*, 503 U.S. 115, 129, 112 S.Ct. 1061, 1071 (1992). Respondent argues in part that petitioners' conduct shocked the conscience because they engaged in deception. *See* Resp. Br. at pp. 37-39. According to respondent's argument, Conn deceived him about giving Traci Baker immunity.[6]

Respondent's contention that Conn deceived him into believing Baker would be granted immunity is pure sophistry for a myriad of reasons. First, neither Conn nor respondent could agree on the type or extent of the immunity to be offered Baker. (2 J.A. 430; 3 J.A. 490-491). It was also unclear whether Baker would accept the use immunity being discussed by Conn and respondent. (2 J.A. 430). Further, Traci Baker had to provide a statement before she would be offered use immunity. (3 J.A. 489). Additionally, respondent was not inclined to accept the use immunity being contemplated by Conn. (2 J.A. 431). Moreover, respondent knew that notwithstanding the discussion of use immunity his client still had to testify before the grand jury, because Conn testified as follows at his deposition:

> " . . . and he spoke about some sort of a letter outlining what it was that I was proposing. And I said, you know, "If that will help, we could do that. But now is the time. Today's the day I would just like to do it now" and he said, "I really can't do anything today. I would like to research this area" . . . so I said, "All right. Let's just go downstairs, and we'll ask our questions. And if she's going to take the 5th, then she takes the 5th." (3 J.A. 491)

In support of his argument that petitioners engaged in conscience-shocking conduct respondent cites the case of *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986). *See* Resp. Br. at pp.

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[6] Any alleged wrongful conduct by Zoeller and Miller in late February; or the prosecutor's search of Baker's home on March 18; or Conn's statement about whether Baker might surrender, are unrelated to respondent's Fourteenth Amendment rights, because an alleged violation of a third party's rights before the search on March 21, cannot be considered a violation of respondent's rights. *See Warth v. Seldin*, *id.*, 422 U.S. at 499, 95 S.Ct. at 2205.

37-38. Although this Court noted in *Moran* that police deception might rise to the level of a due process violation, this was not the holding of the court and it is better characterized as dicta. Furthermore, any alleged deception by Conn is insufficient to establish a substantive due proceses claim here, because the so-called "deception" did not cause respondent to either waive or forfeit his Fourteenth Amendment rights. *See e.g. Moran v. Burbine*, *id.*, 475 U.S. at 423-424, 106 S.Ct. at 1142 where this Court held:

> "Granting that the deliberate or reckless withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."

Since respondent did not waive any of his Fourteenth Amendment rights as a result of the purported deception, the alleged wrongful conduct was not the cause of a violation of respondent's rights. Consequently, respondent cannot base his Fourteenth Amendment claim on conduct, regardless of whether it is wrongful, that is not the cause of a violation of his Fourteenth Amendment rights. *See Fried v. Hinson*, 78 F.3d 688, 691-692 (D.C. Cir. 1996) (By its terms, the due process clause does not apply unless an individual can show that the government action at issue deprives him of an actual interest in life, liberty or property). *See also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436 (1985) (At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged).

Respondent also argues that petitioners were deliberately indifferent to his right to counsel his client. *See* Resp. Br. at pp. 42-44. The deliberate indifference standard is a subjective test and not an objective standard. *See Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979 (1994). Thus, to establish deliberate indifference, government officials must know of and disregard an excessive risk of harm. *See Farmer v. Brennan*, *id.*, 511 U.S. at 837, 114 S.Ct. at 1979.

A review of the facts reveals that petitioners were not deliberately indifferent to respondent's Fourteenth Amendment right to practice his profession. For example, when the warrant was served

on respondent, he was not engaged in advising his client. (2 J.A. 434-435 and 3 J.A. 532-533). Once the warrant was served respondent did not ask that the search be delayed until after his client testified. (3 J.A. 541). Each of Traci Baker's requests to speak with respondent once her grand jury testimony had begun were granted. (3 J.A. 610-614). Each time Baker returned to the grand jury she asserted her Fifth Amendment rights and she never told Conn or Najera that she did not speak with respondent. (2 J.A. 236 and 241; 3 J.A. 610-614). When respondent was informed that his client needed to speak with him, he refused to talk with her. (2 J.A. 437-438).

The above facts demonstrate that petitioners did not know of, nor did they disregard, an excessive risk of harm to respondent's Fourteenth Amendment rights. Since Conn and Najera did not have subjective knowledge of the fact that Baker did not consult with respondent, and because petitioners were not presented with sufficient facts to draw such an inference, their conduct was neither conscience shocking nor deliberately indifferent.

Respondent also argues that Conn and Najera acted with deliberate indifference because there were less intrusive alternatives available to them. *See* Resp. Br. at pp. 44-45. This argument is untenable because the availability of alleged less intrusive alternatives is not part of the deliberate indifference standard. *See Farmer v. Brennan, id.*, 511 U.S. at 837, 114 S.Ct at 1979. Furthermore, the likelihood of other alternatives constitutes, at most, negligence which is insufficient to establish a substantive due process violation.[7] *See County of Sacramento v. Lewis, id.*, 118 S.Ct. at 1718 (Liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process); *see also Daniels v. Williams*, 474 U.S. 327, 333, 106 S.Ct. 662, 666 (1986).

Since the facts show that, at best, petitioners' conduct might have been negligent, the conduct of Conn and Najera was far

[7] Petitioners' do not concede nor suggest in any manner that their conduct was somehow negligent.

below the level of conscience shocking or deliberately indifferent conduct.[8]

IV. RESPONDENT'S CHALLENGE TO THE VALIDITY OF THE WARRANT IS BEYOND THE SCOPE OF THE ORDER GRANTING CERTIORARI.

According to respondent's brief, he disputes that the warrant was validly obtained or executed by the special master. *See* Resp. Br. at p. 41. Any challenge respondent may have had to the validity of the warrant cannot be raised here and should not be considered by this Court, because the validity of the warrant and the reasonableness of its execution are Fourth Amendment issues that are far beyond the scope of the order of certiorari. (3 J.A. 696); *see also Matsushita Elec. Indus. Co. Ltd. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873, 880 n.5 (1996) (Court declines to consider a question outside the scope of the question on which certiorari is granted).

The Ninth Circuit also rejected respondent's challenge to the validity of the warrant. (App. A to Pet. For Writ of Cert., at p.A-20). In addition, respondent's challenge to the execution of the warrant was denied by the Ninth Circuit because the special master was granted absolute quasi-judicial immunity. (App. A to Pet. For Writ of Cert., at p.A-24). Consequently, respondent's claims that there were material misstatements in the warrant application; that the warrant was impermissibly overbroad; or that the warrant was executed in an egregious manner have all been resolved against him.

The significance of the validity of the warrant lies in the fact that the government's conduct was reasonable here, because the

[8] The district court held that Conn and Najera did not engage in conscience shocking conduct (1 J.A. 178-179) and respondent's brief to the court of appeal did not specifically address the issue of conscience shocking conduct. Therefore, respondent may have waived his claim that petitioners engaged in conscience shocking conduct. *See e.g. Officers for Justice v. Civil Service Comm.*, 979 F.2d 721, 726 (9th Cir. 1992), cert. denied 113 S.Ct. 1645 (1993) (failure to raise an issue on appeal results in waiver of that issue).

warrant and its execution were lawful under the Fourth Amendment. In other words, petitioners' alleged interference with respondent's right to practice his profession cannot be considered conscience shocking, deliberate indifference nor unreasonable, because the special master executed a lawful search warrant.

V. RESPONDENT DID NOT HAVE A CLEARLY ESTABLISHED FOURTEENTH AMENDMENT RIGHT THAT PREVENTED HIM FROM BEING SEARCHED AT THE TIME HIS CLIENT TESTIFIED BEFORE THE GRAND JURY.

According to this Court's order of certiorari, the second question before this Court is whether respondent had a clearly established right in March 1994, under the Fourteenth Amendment, not to be searched at the time his client was testifying before the grand jury. (3 J.A. 696). Since respondent's claim is based upon the substantive component of the due process clause there must be a violation of a fundamental liberty interest. *See Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447 (1993); *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 2267 (1997). The due process clause only protects those fundamental rights and liberties which are objectively and deeply rooted in our nation's history and tradition. *See Washington v. Glucksberg*, *id.*, 117 S.Ct. at 2268.

Although an attorney has a fundamental right to practice his profession,[9] neither this Court nor any of the 12 federal circuit courts have held or suggested that an attorney has a fundamental liberty interest not to be subjected to a lawful search warrant at the time his client is testifying before the grand jury. Furthermore, there are no district courts that have held that at a grand jury proceeding an attorney cannot be searched while his client testifies. On the other hand, the federal case law does suggest that there is no fundamental right which prevents an attorney from being searched, pursuant to a valid warrant, at the time his client is

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[9] *See Schware v. Board of Bar Exam's of New Mexico*, 353 U.S. 232, 233-239, 77 S.Ct. 752, 756 (1957); *Greene v. McElroy*, 306 U.S. 474, 492, 79 S.Ct. 1400, 1411 (1959)

before the grand jury testifying. *See e.g. United States v. Mandujano*, 425 U.S. 564, 581, 96 S.Ct. 1768, 1779 (1976) (Witness before grand jury has no constitutional right to be represented by counsel and counsel may not be in grand jury room). Since respondent had no right to be present with his client when she testified before the grand jury, he certainly did not have a fundamental right that would preclude him from being subjected to a valid search warrant at the time his client testified before the grand jury.

According to respondent's brief, the petitioners had fair warning, as set forth in *United States v. Lainer*, 520 U.S. 259, 117 S.Ct. 1219 (1997), that subjecting him to a search at the time his client was testifying before the grand jury was unconstitutional under the Fourteenth Amendment. *See* Resp. Br. at pp. 45-46. The fair warning standard announced by this Court in *Lainer* is the same as the clearly established law standard articulated by this Court in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987). *See United States v. Lainer*, *id.*, 117 S.Ct. at 1227 (So conceived, the object of the clearly established immunity standard is not different from that of fair warning as it relates to law made specific for the purpose of validly applying section 242). The requirement that a right be clearly established guarantees that government officials have sufficient notice of the legal standards that govern their conduct. *See Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 3019 (1984). Thus, in order to give adequate notice a court must identify the right infringed at a high level of particularity.[10] *See Anderson v. Creighton*, *id.*, 483 U.S. at 639, 107 S.Ct. at 3038; *Jean v. Collins*, 155 F.3d 701, 708 (4th Cir. 1998).

Although *Anderson* does not require that a prior case have held identicial conduct to be unlawful, government offficials cannot be ambushed by newly invented theories of liability or by unforeseen applications of old ones. *See Jean v. Collins*, *id.*, 155 F.3d at 708; *see also Lassiter v. Alabama A & M Univ.* 28 F.3d

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[10] Since the right infringed must be identified at a high level of particularity, this Court should adopt the bright line standard for determining when the law is clearly established. *See e.g. Porterfield v. Lott*, 156 F.3d 563, 567 (4th Cir. 1998).

1146, 1150 (11th Cir. 1994) (En Banc) (For qualified immunity to be surrendered, preexisting law must dictate, that is, truly compel and not just suggest or allow or raise a question about the conclusion for every like-situated, reasonable government official that what the defendant is doing violates federal law under the circumstances). Here, the facts and circumstances confronting Conn and Najera were so unique that they could not have foreseen that their conduct was somehow in violation of substantive due process. *See Reno v. Flores, id.*, 507 U.S. at 303, 113 S.Ct. at 1447 (The mere novelty of a claim is reason enough to doubt that substantive due process sustains it).

Respondent contends that *Keker v. Procunier*, 398 F.Supp. 756 (E.D. Cal. 1975), provides clearly established law to support his claim that his Fourteenth Amendment rights were violated when he was searched at the same time his client was testifying before the grand jury. *See* Resp. Br. at p.49, n. 22. The *Keker* decision is insufficient to stake out the clearly established law applicable to the facts and circumstances Conn and Najera faced, because this Court has generally looked to its own case precedents or federal circuit court precedent, instead of district court decisions, as the relevant legal authority for determining whether the law is clearly established. *See e.g. Davis v. Scherer, id.*, 468 U.S. at 192, 104 S.Ct. at 3018; *Elder v. Holloway*, 510 U.S. 510, 513-516, 114 S.Ct. 1019, 1022-1023 (1994); *United States v. Lainer, id.*, 117 S.Ct. at 1226. Consequently, this Court should now adopt, as a general rule, that the relevant legal authority for deciding when the law is clearly established is either a decision(s) of this Court or of the 12 federal circuits, but not the numerous district courts. *See e.g. Jean v. Collins, id.*, 155 F.3d at 709 (Public officials cannot be expected to master the entire corpus of the case law in addition to fulfilling their public responsibilities).

Another reason why *Keker* cannot be used here as the measure of clearly established law is because the case arises in a prison context, whereas the case involving petitioners and respondent arises from a grand jury proceeding. In *Keker*, the attorneys were actively engaged in conferring with their clients when they had to meet with him in an uncomfortably hot interview room, were separated from him by a glass partition, had to communicate with him by telephone and were under continual surveillance by a

guard. In contrast, when respondent was served with the search warrant, he was not actively engaged in conferring with his client. (2 J.A. 434-435). Furthermore, when respondent's client was testifying before the grand jury he had no recognized right to confer with her at that time. *See United States v. Mandujano, id.*, 425 U.S. at 581, 96 S.Ct. at 1779. Since respondent was not actively engaged in advising or visiting with Traci Baker at the time she was testifying before the grand jury, and had no right to be with her inside the grand jury hearing room, the *Keker* case did not provide "fair warning" to either Conn or Najera that it would be a violation of respondent's Fourteenth Amendment rights to cause him to be searched at the time Baker was testifying before the grand jury.

A further reason why the *Keker* case did not make it apparent based upon the facts and circumstances faced by Conn and Najera, that subjecting respondent to a lawful search was unconstitutional under the Fourteenth Amendment, is because it gives inadequate guidance on whether the alleged constitutional infringement claimed by respondent was narrowly tailored to serve a compelling state interest. A fundamental liberty interest may be infringed when the infringement is narrowly tailored to serve a compelling state interest. *See Reno v. Flores, id.*, 507 U.S. at 302, 113 S.Ct. at 1447; *Washington v. Glucksberg, id.*, 117 S.Ct. 2268. Although it is petitioners' unequivocal position that they did not violate respondent's Fourteenth Amendment rights, if one *assumes* merely for the sake of argument, that respondent's Fourteenth Amendment rights were violated, there is still no clearly established law that the service of a warrant at the time the attorney's client is testifying before a grand jury does not serve a compelling state interest.

Here, the service of a warrant on respondent when Traci Baker was testifying before the grand jury did in fact serve a compelling state interest. Since the search warrant was related to a pending grand jury proceeding it served the compelling state interest of determining whether a crime, specifically, perjury, had been committed. *See United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297, 111 S.Ct. 722, 726 (1991) (The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred).

In light of the fact that the search warrant served a compelling state interest, then even if one assumes that there was an infringement of respondent's Fourteenth Amendment rights, there was still no clearly established violation of the Fourteenth Amendment. *See e.g. O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349, 107 S.Ct. 2400, 2404 (1987) (When a prison regulation impinges on an inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests, (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in petitioners' brief on the merits, the Judgment of the United States Court of Appeals for the Ninth Circuit in favor of respondent on the Fourteenth Amendment claim should be reversed.

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Respectfully submitted,

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